

WILDERNESS WATCH

IBLA 95-332

Decided June 13, 1995

Appeal from a decision of the Central Oregon Resource Area Manager, Bureau of Land Management, implementing the Native Hardwoods Supplementation Plan, John Day River Basin. OR-054-5-4.

Affirmed.

1. Wild and Scenic Rivers Act

The failure to prepare a comprehensive river management plan in accordance with 16 U.S.C. § 1274(d)(1) (1988), is not a bar to implementation of a native hardwoods supplementation plan in the John Day River Basin when such a project is consistent with existing resource management plans and protective of resource values listed in the Wild and Scenic Rivers Act.

2. Environmental Quality: Environmental Statements

A challenge to a decision approving implementation of a native hardwood supplementation plan on the basis that the environmental assessment is inadequate will be denied when the appellant fails to highlight any deficiency in the assessment that would warrant overturning the decision.

APPEARANCES: Joseph F. Higgins, Chairman, Northwest Chapter, Wilderness Watch, Portland, Oregon, for appellant; Harry R. Cosgriff, Central Oregon Resource Area Manager, Prineville, Oregon, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Wilderness Watch has appealed and petitioned for a stay of the March 28, 1995, decision record issued by the Central Oregon Resource Area Manager, Bureau of Land Management (BLM), implementing the Native Hardwoods

Supplementation Plan, John Day River Basin, as described in environmental assessment (EA) OR-054-5-4. 1/

The plan is designed to restore riparian hardwood populations which have been severely repressed or virtually eliminated by poor livestock management, agricultural practices, stream channelization, and other human and natural causes. It involves the taking of cuttings from black cottonwood and willow trees and the collection of seeds from other hardwood species native to the John Day Basin. Cottonwood and willow cuttings are to be planted and propagated on a 2-acre enclosure site near Twickenham, Oregon, at John Day River Mile 139. The propagation nursery is located on agricultural lands recently acquired by BLM, and it is intended to provide BLM with a continuous future supply of native riparian trees for planting projects in the John Day River Basin. Cuttings from the propagation nursery will be outplanted to enhance riparian habitats along the John Day River, its forks, and tributaries. Fencing will be constructed to protect seedlings from wildlife and livestock. Mechanical farm equipment will prepare the site and weed control will be consistent with the Prineville District Integrated Weed Management EA of June 1994. Water to irrigate the propagation nursery will be withdrawn from the John Day River pursuant to a BLM water right for 0.75 cubic feet per second.

The Area Manager's decision states that the project "is subject to and in conformance with" the Two Rivers Resource Management Plan (RMP) of September 1985, the John Day RMP of August 1985, and the BLM Manual.

On appeal, appellant makes two general arguments. First, it argues that the Area Manager's decision is "illegal" because it fails to adhere to the requirements of the Wild and Scenic Rivers Act (the Act), as amended, 16 U.S.C. §§ 1271-87 (1988). Second, it alleges that the Area Manager based his decision on an inadequate EA.

Appellant argues that the project fails to comply with section 3(d)(1) of the Act, 16 U.S.C. § 1271(d)(1) (1988), because no comprehensive plan for protection of river values was ever completed by September 30, 1991, as required by that section. 2/ For this reason, appellant asserts, EA

1/ On Feb. 13, 1995, the Area Manager issued a Finding of No Significant Impact for the plan. There is no evidence in the record of a separate appeal being filed by appellant from that finding.

2/ Section 3(d)(1) provides that "[f]or rivers designated on or after Jan. 1, 1986, the Federal agency charged with the administration of each component of the National Wild and Scenic Rivers system shall prepare a comprehensive management plan for such river segment to provide for the protection of river values." Such a "plan shall be coordinated with and may be incorporated into resource management planning for affected adjacent Federal lands. The plan shall be prepared * * * within 3 full fiscal years after the date of designation."

OR-054-5-4 was completed without the proper evaluation as to how the project would impact other values such as wilderness study areas (WSA's), the free-flowing nature of the river, "the desired future condition of the lands and waters within the corridor, protection and enhancement of water quality, visual management, etc."

In response, the Area Manager admits that the Wild and Scenic River Plan is not complete. However, he states that management actions are not suspended in the interim and management actions on the John Day River are guided by the Two Rivers RMP until replaced by a new plan. He explains that management actions along the river are evaluated in conformance with the Two Rivers RMP and with the Act. The segment of the river embracing the tree propagation area, he notes, is classified as "recreational," a classification which does not preclude the action in question. He asserts that the project is also consistent with BLM policy regarding wild and scenic rivers and WSA's.

[1] Having reviewed pertinent provisions of the Act, we find that BLM's project, as evaluated in its EA, is protective of the values listed in the Act and conforms to its overall objectives. As the Area Manager indicates, while no specific plan addressing the river has been completed, management actions are not precluded in the interim. It appears that the project not only is consistent with present land-use plans, but also is beneficial to resource values about which appellant expresses concern.

A fair reading of the EA indicates that the project will enhance and not detract from these values. See EA at 3-6.

Appellant also asserts that BLM is required by section 1(b) of the Act, 16 U.S.C. § 1271(b)(1) (1988), to preserve the free-flowing condition of the John Day River. 3/ It contends that in accordance with section 16(b), 16 U.S.C. § 1286(b) (1988), free-flowing means without diversion and that BLM will not meet its responsibility if it diverts water from the river. 4/

The Area Manager responds that BLM's water diversion is not contrary to the Act, especially in light of the fact that the purpose of the project is to enhance the outstandingly remarkable values for which the river was

3/ Section 1(b) of the Act states that it is the policy of the United States to preserve "in free-flowing condition" selected rivers, which, along with their immediate environments, possess "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values."

4/ That section defines "free-flowing" as "existing or flowing in a natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway." This provision does not, however, preclude the existence of "diversion works, and other minor structures" at the time a river is proposed for inclusion in the national wild and scenic river system.

designated. He points out that the exercise of the water rights acquired by BLM on the John Day River antedate the wild and scenic designation, and that BLM proposes to make use of these rights to enhance the outstandingly remarkable values for which the area was designated.

We find nothing in the record or the EA that indicates that the free-flowing nature of the river will be adversely affected by diversion of the water for the project. Under the Act's definition of "free-flowing," water diversions are not impermissible on designated rivers (16 U.S.C. § 1286(b) (1988)), and we note that the water right involved was exercised prior to the river's inclusion in the wild and scenic river system. See Document No. 35 in the administrative record.

Appellant also argues: "If you want to have a legal diversion considered, you need to complete the analysis required by Sec. 7(a) of the Act." The section referred to by appellant, 16 U.S.C. § 1278(a) (1988), is entitled "Construction projects licensed by the Federal Energy Regulatory Commission." There is no evidence that the diversion proposed by BLM, irrigating for a few hours every 5-7 days during the summer, constitutes a "construction project" requiring licensing by the Federal Energy Regulatory Commission. Appellant has failed to prove the necessity for a section 7(a) analysis.

[2] Appellant also contends that the EA is inadequate in several respects. First, appellant asserts that while the EA states the project will impact the river, it does not explain what the impact will be. Next, appellant states that the EA fails to cover the impacts of the project, specifically of fencing and screening, on wilderness characteristics in adjacent WSA's.

In response, the Area Manager states that "BLM must write EA's to the level of detail necessary to make a good decision. While there may be other information of interest to the reader of the EA, the information contained was sufficient for the circumstances and decision" (Response at 2). He continued by stating that riparian habitats in the John Day River Basin have been degraded in many areas by an array of human actions and natural events, and that while natural regeneration and restoration of habitats by improving livestock management is preferable, total reliance on natural processes is unwise. Regarding fences, he states that BLM interim management policy for WSA's, contained in Instruction Memorandum No. 94-236, "allows for temporary intrusions, such as fences, when they are used to enhance Wilderness values. Supplementing depressed populations of native riparian hardwoods within WSA's (and protecting with caging and fencing) would improve riparian conditions which directly enhances Wilderness values" (Response at 3).

We find that appellant has failed to highlight any deficiency in the EA that would warrant overturning the Area Manager's decision. BLM identified the need for the project and the affected environment. It notified

the public of its proposed action. The EA included descriptions of alternatives. BLM identified the impact of approval of the project on various resources. It also specifically considered the effect on WSA's.

The EA states that the John Day River passes through three WSA's and is near two others (EA at 5). The EA also states that the project is expected to have beneficial or enhancing effects on such critical elements as wilderness and wild/scenic river values. Id. at 11. In addition, the EA does address certain specific impacts on the river. The "main project proposal objective" is "[i]mproving cold-water fish habitat through increasing streamside vegetation." Moreover, increasing riparian tree and shrub densities "will increase bank stability, canopy cover (stream shade), and may moderate water table fluctuations." Listed among long-term benefits are the creation of fish habitat and the moderation of erosive potential. Id. at 3.

The standard for managing a WSA during wilderness review is found in section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988). The Secretary is expressly directed to "manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (1988); see generally Ralph E. Pray, 105 IBLA 44, 46 (1988); California Wilderness Coalition, 101 IBLA 18, 25 (1988). "Impairment of suitability for inclusion in the Wilderness System" is defined as taking actions that cause impacts "that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole" by the time the Secretary is scheduled to make a recommendation to the President on the area's suitability for wilderness. (Emphasis supplied). 43 CFR 3802.0-5(d). There is no indication in the case before us that protective measures for plantings, which are to be removed in time, will cause unacceptable impacts under this standard.

Our disposition of the appeal renders moot appellant's request for a stay.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

James L. Burski
Administrative Judge